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NO JOY IN MUDVILLE TONIGHT: THE IMPACT OF "THREE STRIKE" LAWS ON STATE AND FEDERAL CORRECTIONS POLICY, RESOURCES, AND CRIME CONTROL

David Schultz†

My object all sublime
I shall achieve in time—
To let the punishment fit the crime[1]

INTRODUCTION

Since at least the time Barry Goldwater and Richard Nixon ran for the presidency in 1964 and 1968 respectively, Americans have considered crime as a national problem.[2] Politicians have mobilized this fear of crime for electoral purposes, running campaigns to "get tough on crime" by building more prisons, limiting prisoners' due process and appellate rights, cracking down on allegedly lenient judges, and by giving law enforcement officials more latitude and ability to investigate, apprehend, and arrested accused individuals.[3]

During the 1990s the number of Americans viewing crime as a major national problem continued to increase. For example, in 1991, only 6% of the population described crime as the most important problem facing the country, whereas by 1993, 16% of Americans held that view.[4] As a result 66% of the Americans supported making it more difficult for

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1 William Schwenck Gilbert, The Mikado; or the Town of Titlu, *in* THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 382 (1976).

2 STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER xi, 76-79 (1984). Gallup Poll and other public opinion surveys throughout the 1960s and 1970s indicated that Americans consistently ranked crime as one of the most pressing problems facing the county or otherwise demonstrated public support for a variety of get tough measures, including an increasing support for the death penalty from the 1970s onward. *Id.* at 45-49.

3 *Id.*

4 GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993 168 (1993); GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1994 135 (1994).

those convicted of violent crimes to be paroled;[5] 59% supported significant bail restrictions for those accused of violent crimes;[6] and 48% supported increased sentences for all crimes.[7] Similarly, public opinion supported limits on death penalty appeals; extending the death penalty to cover new offenses; and giving police greater latitude to stop and search accused criminals and detain suspects for twenty-four hours without bail.[8] In addition to these typical panaceas to address crime, the public also endorsed other crime control measures including boot camps for juvenile offenders (66% support);[9] fines or prison sentences for parents of juvenile criminals (48%);[10] and community notification for released sex offenders (89%).[11] But perhaps one of the most popular measures purposed during the early 1990s were "three strike" laws under which a person convicted of three serious felonies would automatically be locked up for extended period of time including life without parole. While habitual or repeat offender laws were not new to the American criminal justice system,[12] the intensity of support for three strike laws – 74% of the American public supporting these laws in 1994[13] – led to the passage of these laws by twenty-two states and the federal government between 1993 and 1995. Ironically, all of these laws were adopted at a time when FBI Uniform Crime Reports were indicating that the crime rates in America were actually stabilizing or going down and not up.[14]

Three strike laws were heralded by its proponents as the new get tough way to reduce crime and get habitual offenders off the streets.[15] Conversely, the opponents described these laws as costly, cruel and unusual punishment in terms of disproportionality of sentencing, and certain to produce an abundance of geriatric inmates in overcrowded prisons.[16] As the fifth anniversary of some of these laws approach, it is appropriate to ask what impact three strike laws have really had. Have they reduced crime, increased corrections costs, or taken hundreds or thousands of vio-

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5 GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993 214 (1993).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1994 133 (1994).

12 *See infra* notes 17-85 and the accompanying text.

13 GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1994 134 (1994).

14 Michael Vitiello, *Three Strikes: Can We Return to Rationality?* 87 J. CRIM. L. & CRIMINOLOGY 394, 395-96 (1997) [hereinafter "Vitiello I"]. Scheingold, *supra* note 2, at 43(noting that public fears of crime have consistently gone up in the last twenty years at times when crime rates and victimization has actually decreased).

15 *Id.* at 412.

16 Ilene M. Shinbein, *"Three Strikes and You're Out": A Good Political Slogan to Reduce Crime, But a Failure in Its Application,* 22 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 200-201 (1996).

lent criminals off the streets and placed them into overcrowded prisons? It seems that there are no clear answers to these questions.

This article examines the impact and efficacy that the three strikes laws have had upon state and federal corrections policy, resources, and crime control. The claim to be made in this article is that three strikes laws have had almost no demonstrable impact upon violent crime both because the three strikes laws have been underutilized, and because, for reasons to be specified below, the habitual violent offenders whom these laws appear to have been intended to apprehend have not necessarily been incarcerated under these laws. In addition, because of their underutilization, three strikes laws have not necessarily led to the social costs critics claimed, but nonetheless, where these laws have been employed they had a significant impact upon trials, the racial composition of prisons, and their application in plea bargaining. The laws have not had either the positive or negative effects supporters and critics prophesied. Instead one could describe the laws as at best harmless symbolic measures, or at worst a waste of resources that mislead the public into believing something is being done to address crime when, in fact, little has been done.

To substantiate these claims, part one of the article will examine briefly the legal background of habitual offender statutes. Part one then will examine the political forces leading to the passage of three strikes laws, indicating the variety of laws that states and the federal government did adopt. Part two examines the use and impact of these laws in several states and with the federal government. The conclusion will address some the lessons to be learned from these laws.

I. HABITUAL OFFENDER LAWS: THE LEGAL AND POLITICAL BASEPATH TO THREE STRIKES

A. PROPORTIONALITY AND EARLY HABITUAL OFFENDER LAWS

Recidivism and chronic criminal behavior have been vexing problems for the American criminal justice system since the colonial days. In attempt to deal with these problems the courts had upheld colonial government and state laws imposing increased sentences for those previously convicted or crimes.[17] These laws implicated questions regarding how to deal with those individuals who continue to commit crimes despite the imposition of punishment including imprisonment. One solution, of course, was an attempt to consider past criminal behavior when determining punishment for a new crime, and in 1912 the

17 *See* Ilene M. Shinbein, *Three_strikes and You're Out": a Good Political Slogan to Reduce Crime, but a Failure in its Application,* 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1996).

Supreme Court first ruled upon a habitual offender law in *Graham v. West Virginia.*[18]

1. Graham v. West Virginia

In *Graham* at issue was a state law which added five years to a prison sentence for anyone who had been previously convicted for a similar crime, while someone who had been twice convicted of a similar offense would receive a life sentence.[19] In 1898 Graham pled guilty to grand larceny, and three years later he pled guilty to burglary. In both cases he served time in jail. Subsequently, in 1907 Graham was again arrested for larceny, and in 1908 he was sentenced to life imprisonment under the West Virginia habitual offender law.[20] Graham appealed his life sentence, claiming "(1) that he has been deprived of his liberty without due process of law; (2) that he has been denied the equal protection of the laws; (3) that his privileges and immunities as a citizen of the United States have been abridged, and that he has been denied his immunity from double jeopardy; and (4) that cruel and unusual punishment has been inflicted."[21] The Court rejected all of these claims.

First the Supreme Court first observed that English and American courts had long recognized the practice of "inflicting severer punishment upon old offenders" and, therefore, there was no due process violation.[22] Second, the Supreme Court rejected Graham's double jeopardy argument, stating that the increased penalty he received for his third offense was not inflicting double punishment for the past offenses. Instead, the defendant was merely being punished for his third offense.[23] At no point was his enhanced punishment directed towards new convictions or indictments for previous offenses and therefore the double jeopardy provision was not implicated.[24] Third, the Supreme Court rejected Graham's equal protection claim that he was discriminated against because he was a former convict,[25] stating both that proper due process protections were afforded before the life sentence was imposed,[26] that the Fourteenth Amendment did not demand a strict equality, and that it may recognize differences in punishment based upon whether one had been previously convicted of a crime.[27] The Supreme Court noted also that the defendant

18 Graham v.West Virginia, 224 U.S. 616 (1912).
19 W.Va. Code §§ 4475-4476, 4692-4696 (1906).
20 224 U.S. at 620.
21 *Id.* at 623.
22 *Id.*
23 *Id.* at 623.
24 *Id.* At 624.
25 *Id.* at 629.
26 *Id.* at 630.
27 *Id.*

had been given a sentence similar to that of what others who had committed three offenses would have received. Given this and since proper procedures had been followed before imposing the sentence, neither were Graham's privileges and immunity infringed nor could the sentence be considered cruel and unusual punishment.[28]

While *Graham* upheld what could be described an early forerunner of a three strikes law, in 1927 California did in fact pass an early version of a three strikes law that sentenced thrice convicted nonviolent offenders to life in prison.[29] California repealed this law in 1935, but eleven other states had similar habitual offender laws. By 1980, only West Virginia, Washington, and Texas had these laws still on the books.[30]

2. Weems v. United States

The decision in *Graham* demonstrated that the Court would uphold enhanced criminal penalty provisions. Yet the demands of proportionality in sentencing in other cases limited significantly the types of sentences that could be imposed for certain offenses, thus calling into question the constitutionality of some habitual offender laws. For example, in *Weems v. United States*[31] the issue was whether a Philippine law calling for a fine and imprisonment ranging from twelve to twenty years in cases where a public official falsified a public document was cruel and unusual punishment.[32] At the time the defendant Weems was indicted and convicted, the Philippines was part of the United States and it had its Bill of Rights modeled upon the United States Bill of Rights including a "cruel and unusual punishment clause."[33] Weems was convicted of falsifying payroll information, and given a sentence of fifteen years of prison with hard labor and a fine of 4,000 pesetas.[34] Weems' sentence was subsequently upheld by Philippine courts, but the United States Supreme Court reversed.

In reversing the sentence as being cruel and unusual punishment, the Supreme Court undertook an exhaustive review of the original debates surrounding the crafting of the cruel and unusual punishment clause. The court arrived to the conclusion that "it is a precept of justice that punishment for crime should be graduated and proportioned to of-

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28 *Id.* at 630-31.

29 1927 Cal. Stat. 634.

30 Frank A. Zieglar & Rolando V. DelCarmen, *Constitutional Issues Arising From "Three Strikes and You're Out" Legislation* 3, 7-9 *in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY (David Schichor and Dale K. Sechrest eds. 1997).

31 Weems v. United States, 217 U.S. 349, 362 (1910).

32 *Id.* at 359.

33 *Id.* at 367.

34 *Id.* at 366.

fense."[35] This proportionality requirement was a part of the mandate of the cruel and unusual clause. This meant that the sentence imposed upon Weems was disproportionate to the crime committed, especially given that sentence could be imposed for falsification, even though no one was hurt by the falsification.[36] The Supreme Court invalidated the entire law, not just the sentence given to Weems, finding that even the minimum sentence imposed for the crime would have constituted cruel and unusual punishment.[37]

3. *Recent Proportionality Decisions*

Weems stood out for the proposition that disproportionate sentences for repeat offender laws might be struck down if the sentence imposed seemed out of line with the type of past offenses that might implicate these habitual offender statutes. Similarly, in other cases such as *Robinson v. California* decision,[38] the Court drew limits as to what the state could punish, [here, mere addiction to drugs,][39] and incorporated the proportionality requirement to state offenses. In *Trop v. Dulles*[40] the Court stated that the power to punish must "be exercised within the limits of civilized standards," and that the meaning of the cruel and unusual clause of the Eighth Amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society."[41] The Eighth Amendment appeared to stipulate limits on punishment and include a proportionality requirement. Yet, despite producing inconsistent results, the Supreme Court's decisions in four cases paved the way for the eventual constitutionality of most if not all three strikes types of laws.

In *Rummel v. Estelle*[42] the defendant Rummel was convicted in 1973 for obtaining $120.75 under false pretenses. This conviction came after a 1964 conviction for $80 in credit card fraud and a 1969 conviction for forging a check worth $28.[43] Upon his third conviction, Rummel was sentenced to life under a Texas statute that provided for life imprisonment for anyone convicted of three felonies.[44] Rummel appealed his sentence, claiming that life[45] for these crimes was cruel and unusual

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35 *Id.* at 367.

36 *Id.* at 363.

37 *Id.* at 381.

38 Robinson v. California, 370 U.S. 660, 660 (1962).

39 The count held that merely being addicted to drugs could not be illegal.

40 Trop v. Dulles, 356 U.S. 86, 100 (1958).

41 *Id.* At 101.

42 Rummel v. Estelle, 445 U.S. 263, 266 (1980).

43 *Id.* at 265.

44 *Id.* at 266. Rummel was sentenced to life under the then Texas Penal Code Ann. § 12.42(d) (West 1973).

45 *Id.* at 270-71. Specifically, Rummel did not challenge enhanced penalties for the three convictions, but instead the life sentence.

punishment and a disproportionate sentence to the three crimes which resulted in his steeling less than $240 in total.[46] While the Texas Court of Criminal Appeals affirmed his sentence, the Fifth Circuit Court of Appeals reversed on the proportionality grounds relying on *Weems*.[47] On rehearing the Fifth Circuit, sitting en banc, vacated,[48] and on certiorari to the United States Supreme Court upheld Rummel's life sentence.[49]

In rejecting Rummel's claims, the Supreme Court first disposed of his arguments that recent cases striking down death as a disproportionate penalty[50] were inapplicable to his case because death was a unique type of penalty that had attached to it special proportionality issues.[51] Second, the Supreme Court distinguished Rummel's claims from those found in *Weems*, arguing that in the latter case it was not merely the length of the incarceration that was at issue. Instead, the hard labor and other terms of confinement were also important to the court finding the sentence to be cruel and unusual and disproportionate.[52] Third, the Supreme Court argued that objective and not merely subjective factors were required to determine what constituted disproportionality. Appealing merely to judges' personal preferences was an inappropriate way to determine what is cruel and unusual or disproportionate.[53] Once death is no longer an issue, according to the Supreme Court, determinations to what constitutes an appropriate sentence are subjective and best left up to local legislatures to decide.[54] Finally, to buttress its other claims, the Supreme Court also cited *Graham v. West Virginia* as precedent, indicting that it had already upheld what it felt to be a very similar life sentence.[55]

In *Hutto v. Davis*[56] the Supreme Court again defered to local legislature determination what was an appropriate punishment for a crime. Here, at issue was two concurrent twenty year sentences and $20,000 fine for the possession of nine ounces of marijuana. In overturning habeas corpus based on proportionality and the cruel and unusual punishment clause, the Supreme Court indicated that its *Rummel* decision stood

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46 *Id.* at 265-66. Rummel did not raise a facial claim against the Texas statute, instead he argued that it was unconstitutional as applied to him. *Id.* at 268. Furthermore, in *Spencer v. Texas,* 385 U.S. 554 (1967) the Court had upheld facial challenges to this Texas statute.

47 Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978)(en banc), vacated on reh'g, 587 F.2d 651, 653 (5th Cir. 1978), aff'd, 385 U.S. 263 (1980).

48 Rummel v. Estelle, 587 F.2d 651, 653-654 (5th Cir. 1978).

49 Rummel v. Estelle, 445 U.S. at 264.

50 *See, e.g.,* Coker v. Georgia, 433 U.S. 584, 592 (1977); Gregg v. Georgia, 428 U.S. 153, 172 (1976); Furman v. Georgia, 408 U.S. 238, 279-80 (1972).

51 Rummel v. Estelle, 445 U.S. at 272.

52 *Id.* at 273.

53 *Id.* at 274-5.

54 *Id.* at 282.

55 *Id.* at 276-77.

56 Hutto v. Davis, 454 U.S. 370, 374-75 (1982).

for the proposition that sentencing guidelines are generally policy issues for the legislatures and not the courts.[57] This means that the lower federal courts should not second guess the lines of initial punishment drawn by local legislatures and should follow *Rummel* in order to prevent anarchy within the federal judicial system.[58]

Rummel and *Hutto* appeared to sanction broad deference to legislatures' desire impose severe sentences, even in cases of habitual offenders. However, in *Solem v. Heim*[59] the Court reversed itself and invalidated a version of a three strikes law. In *Helm*, at issue was a life sentence imposed on a defendant under a South Dakota statute for issuing a bad check in the amount of $100.[60] The normal sentence for this crime was a maximum five years and a $5,000 fine, but because the defendant had six prior felony convictions—three for burglary and one felony each for obtaining money under false pretenses, grand larceny, and driving while intoxicated[61]—the South Dakota recidivist statute mandated a life sentence. The state supreme court and the court of appeals denied habeas corpus and affirmed the conviction, but the Eighth Circuit Court of Appeal overturned.[62] The Supreme Court affirmed.

Writing for the majority, Justice Powell first indicated that proportionality was deeply rooted in English and American law,[63] and that it applies to all types of sentences including felonies even where death is not a penalty.[64] Rejecting *Rummel's* claim that death is different in terms of assessment of proportionality, the Supreme Court indicated that it saw no reason to draw a "distinction with cases of imprisonment" versus death.[65] Powell stated that:

> In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in *Robinson v.*

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57 *Id.* at 374.

58 *Id.* at 375.

59 Solem v. Helm, 463 U.S. 277, 303 (1983).

60 *Id.* at 281.

61 *Id.*

62 Helm v. Solem, 684 F.2d 582 (8th Cir. 1982), aff'd, 463 U.S. 277 (1983).

63 *Id.* at 284.

64 *Id.* at 288-89.

65 *Id.*

> *California*, a single day in prison may be unconstitutional in some circumstances.[66]

To determine whether a sentence was disproportionate, the Court proposed a three part test, looking to: 1) the gravity of the offense and the harshness of the penalty;[67] 2) a comparison of the sentences imposed on other criminals in the same jurisdiction;[68] and 3) a comparison of the sentences imposed for commission of the same crime in other jurisdictions.[69] This three part test would guide the courts in determining proportionality under the cruel and unusual punishment clause.[70] Applying the test in this case the Supreme Court found that Helm's sentence was disproportionate in terms of all three criteria and, therefore, violated the cruel and unusual punishment clause.[71] Moreover, Powell distinguished *Rummel* from *Helm*, noting that the former had a possibility of parole attached to the life sentence whereas in the latter case there was no such possibility.[72]

The dissent argued that the *Helm* test would be difficult to administer, and that it would lead both to confusion in lower courts and to significant reversal of sentences. Neither proved to be the case: only four state cases were reversed on the basis of the *Helm* test in eight years.[73] Despite this lack of confusion, the Supreme Court again appeared to reverse itself in *Harmelin v. Michigan*[74] and returned to its *Rummel* standards.

In *Harmelin* the defendant was convicted under Michigan law of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole.[75] He appealed asserting that under the *Helm* test his sentence was disproportionate.[76] In upholding his conviction, Justice Scalia rejected the use of the *Helm* test to determine the constitutionality of disproportional sentences,[77] claiming that "5-to-4 decision eight years ago in *Solem* [*v. Helm*] was scarcely the expression of clear and well accepted constitutional law and that the decision was wrong."[78] Instead, Scalia returned to the claims found in

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66 *Id.* at 290.
67 *Id.* at 290-91.
68 *Id.* at 291.
69 *Id.* at 291-92.
70 *Id.* at 292.
71 *Id.* at 303.
72 *Id.* at 302-03.
73 Clowers v. State, 522 So.2d 762 (Miss. 1998); Ashley v. State, 538 So.2d 762 (Miss. 1989); Gilham v. State, 549 N.E.2d 555 (Oh. 1988); Naovarth v. State, 779 P.2d 944 (Nev. 1989).
74 501 U.S. 957 (1991).
75 *Id.* at 961.
76 *Id.* at 961-62.
77 *Id.* at 962.
78 *Id.* at 965.

Rummel that sentencing decisions are basically legislature determinations, and that, generally, the courts should not intervene.[79] Moreover, according to Scalia, while a severe sentence may be "cruel" it is not necessarily unusual, and unless it were both, it would not violate the Eighth Amendment.[80] After an extensive historical review of punishments under the Eighth Amendment, Scalia found that proportionality was not a right necessarily protected under this Amendment,[81] and, therefore, the defendant's life sentence was not unconstitutional.

Scalia's opinion was not widely endorsed: only Rehnquist joined in the outright rejection of the *Solem* test.[82] Justice Kennedy's concurrence, joined in by two other Justices, accepted a narrow proportionality principle that applied only to "greatly disproportioned" sentences.[83] According to Kennedy, *Solem* and *Rummel* shared similar concerns about deference to state legislatures, and the need for objective decisions. He concluded that:

> [T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.[84]

Applying the *Solem* test, Kennedy found that the sentence was not so disproportionate that it violated the Eighth Amendment, and, therefore, he upheld the life sentence accepting Michigan's determination that the linkage between drugs and violent crime warranted imposition of severe sentences to address this type of criminal activity.[85]

By 1991 the Supreme Court had reversed itself numerous times on the issue of proportionality and constitutionality of habitual offender statutes. Yet, after *Harmelin* it appeared that only "greatly disproportionate" sentences would be invalidated under the *Solem* test, and that, in general, there were no real impediments to the imposition of a repeat offender laws. In effect, the legal basis for three strike laws had been cleared.

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79 *Id.*

80 *Id.* at 966-67.

81 *Id.* at 985.

82 *See* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 191-92 (1996) (discussing Scalia's opinion in this case).

83 *Id.* at 996.

84 *Id.* at 1001.

85 *Id.* at 1002-03.

II. "STEPPING UP TO THE PLATE": THE POLITICAL CONTEXT OF THE THREE STRIKE LAWS

In addition to clearing the legal basis for the enacting three strike laws, several political and social factors contributed to the raise of public demand for enactment of three strike laws.

A. "SWING AND A MISS: STRIKE ONE": CRIME IN THE EARLY 1990s

There was a general impression that violent crime was on the rise in the early 1990s, even though the overall crime rate and victimization was still lower than it had been several years before. More important, penological research indicated that repeat offenders were a major source of crime. By some estimates, "as few as 5 percent of all offenders may account for over half of all robberies and other violent crimes for gain."[86] This research suggested that in many cases simple incarceration for a longer period of time of some habitual criminals would reduce the number of crimes. In addition, there was a growing belief that rehabilitation as a penological goal had failed. Increasing recidivism rates, indicating that larger percentages of inmates were committing crimes and returning to jail again suggested that incarceration longer periods of time, was a solution to the perceived rising [number of crimes] [crimes] [crime rates].[87]

Tougher mandatory minimums were depicted as one way to deter criminals, yet there was little evidence that such laws had much impact. For example, Franklin Zimring and Gordon Hawkins' study of mandatory minimum laws found little impact in deterring crime.[88] Studies in Massachusetts, Michigan, Florida, New York, and elsewhere reached similar conclusions.[89] Good social science evidence was thus available to frame the debates on three strikes to show that mandatory minimums and enhanced penalty laws had little impact on crime. However, while social scientists often like to believe that their research will have policy import, it appears that sentencing studies had little impact on the three strikes debate.

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86 Lawrence W. Sherman, *Patrol Strategies for Police, in* CRIME AND PUBLIC POLICY 145, 160 (James Q. Wilson ed. 1983).

87 *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (2nd ed. 1983) (suggesting that rehabilitation as a form of punishment has failed and that incapacitation is the best choice as a justification for incarceration).

88 FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 125 (1995).

89 Dale Parent, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION 1, 2 (January, 1997).

B. "FOUL BALL, STRIKE TWO": PUBLIC OPINION AND MEDIA COVERAGE

In the early 1990s, a significant portion of public viewed crime as the most serious noneconomic problem facing the country and demands to get tough on crime were hardening.[90] Both media accounts of crime on the local news that created the impression of escalating violence on the streets and the use of the crime by politicians as an election issue fueled this demand.[91] In 1992, President Bush ran for reelection calling for the passage of three strikes laws, while in1994 Governor Wilson in California rode to reelection on a get tough on crime platform demanding the passage of a similar law.[92] Finally, several high profile cases, such as the Polly Klass murder by a released criminal in California, also drove the public demand to increase penalties and adopt what would come to be known as three strikes legislation.

Thus, debates about tougher criminal sentences in 1993 came in the context that could be called a frenzied emotional setting. Fears of crime and victimization were running high. Politicians were appealing to this mood, and the media was increasing its coverage of violent crime rendering the local news as no more than "crime, weather, and sports." Given this climate, three strikes laws were passed by twenty-two states and the federal government between 1993 and 1995. Exactly what offenses were counted as strikes rather than foul balls or how the laws in each case worked varied significantly.

The state of Washington, the first state to adopt three strikes legislation,[93] did so via a voter initiative that supported the law by a three-to-one margin.[94] The Washington law would lead to life imprisonment without parole if a defendant is convicted of a third offense from a prescribed "most serious offense" list. This list of offenses includes actual or attempted class A felonies, including murder, extortion, robbery, rape, and some forms of vehicular homicide and class B felonies if there is a finding of sexual motivation. The prosecutor does not have to charge under the three strikes law, but if she does and the defendant is found guilty, the judge must impose the mandatory sentence.

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90 *See supra* notes 4-7.

91 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 452 (1993).

92 *See* Vitiello I, *supra* note 14, at 122-23, 418-20.

93 WASH. REV. CODE. ANN. § 9.94A.392 (West. Supp. 1996). and see Vitiello, *supra* note 14 at 395-96.

94 John Clark, James Austin, D. Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation*, NAT. INST. JUST. RESEARCH IN BRIEF 1 (January, 1997).

California was the next to adopt three strikes legislation in a charged political atmosphere.[95] Several events were critical to its passage. On June 29, 1992, Kimber Reynolds was murdered by a career criminal. This prompted to the victim's father, Mike Reynolds, to work with a judge on a draft of the original version of the three strikes law.[96] In 1993, Reynolds secured a state assembly sponsor for what would be Assembly Bill 971. The bill was killed in committee, and Reynolds sought to use the state initiative process to place the measure on the ballot. Despite National Rifle Association and California Corrections and Peace Officers Association support, signature gathering was going slowly and the bill appeared to be doomed were it not for the murder of Polly Klass in late 1993.[97]

Polly Klass's murder by repeat offender Richard Allen Davis enjoyed significant state and national media coverage. The coverage produced a boom to the signature gathering process, with over 50,000 signatures secured within three days of Polly Klass' murder.[98] In 1994 Assembly Bill 971 returned to the state legislature but under very different circumstances. Public outrage over the Klass murder was high, media coverage of the bill intense, and, most importantly, 1994 was an election year for the California Governor, the state legislature, and the United States Congress. Nationally, the Republican Party and its "Contract with America" made crime a center stage issue. President Clinton was also talking tough on crime, demanding that his new crime bill be passed. In California, Reynolds secured Governor Pete Wilson's support for his three strikes initiative and the latter linked together passage of the bill and his reelection.[99]

There were now several contrasting bills in the California state legislature, each tougher than the other. One option, the three strikes with life and no parole, was latched on to by the Governor even though other three strikes options existed and called for tougher sentences for targeted offenders with costs much lower than the three strikes option supported by the Governor. Supporters of the life without parole version of three strikes claimed significant savings associated with three strikes. They argued that the overall cost in the reduction of crime would outweigh any of the costs associated with increased incarceration and prison construction. A RAND study indicated that the net overall savings would be $23

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95 *See* Vitiello I, *supra* note 14, at 409; *see also* Michael Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy* 30 LOY. L.A.L.REV. 1643, 1672 (1997) [hereinafter "Vitiello II."].

96 *See* Vitiello I, *supra* note 14, at 410.

97 *See id.* at 410-12.

98 *See id.* at 412.

99 *See id.* at 412-14.

billion by the year 2000,[100] and that targeting specific repeat offenders would have a significant impact crime decreasing the crime rate between 22% and 34%.[101] RAND studies contested the savings, indicating that the proposed law would lead to a 120% increase in the prison budget[102] and an overall cost of $5.5 billion to implement three strikes.[103] Despite evidence of the costs, indications that state revenues were unavailable for corrections, and claims that the law would lead to an explosion of the general and geriatric inmate populations, three strikes went to the voters with the RAND study suggesting significant savings in costs to victims as well as a decrease between 25% and 75% in actual spending on crime prevention.[104] Similarly, throughout the campaign voters assumed that three strikes would only put violent offenders—rapists and murders—under its gambit. However, Proposition 184 also counted burglary and drug possession as a strike.[105] In the midst of all this, Proposition 184 was adopted by over 70% of the voters in an election marked by heavy funding in support of three strikes.[106]

What eventually passed had provisions for both second and third strikes. For those convicted of a second "serious felony," there is an additional five years sentence sentence running consecutively to the current conviction.[107] For a third conviction of a serious offense, the sentence is life imprisonment.[108] A serious offense included a broad variety of criminal actions, ranging from murder, rape, and sodomy to the selling of certain drugs.[109] Finally, the three strikes law limits the ability to plea bargain on three strikes by stipulating that the law "shall be applied in every case."[110] However, the law still preserves the discretion of the prosecutor to strike some prior felony conviction,[111] while confining the

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100 *Id.* at 420; Vitiello II, *supra* note 95, at 1675.

101 Vitiello I, *supra* note 14, at 419.

102 *Id.* at 419 n.137.

103 *Id.* at 419.

104 Vitiello II, *supra* note 95, at 1674-75. In fact, as Vitiello notes, scholars questioned many of the assumptions that went into the Romero study. For example, he assumed that each offender targeted by three strikes committed between 20 and 150 crimes per year and therefore there would be significant social savings in reduced security, etc., as a result of incapacitating these individuals. Similarly, one RAND study assumed some offenders committed over 600 offenses per year. Both the Romero and RAND study estimates far exceeded the median of 15 offenses per year that were more generally accepted by most in the criminological field. *See id.* at 1674.

105 *Id.* at 1684.

106 Vitiello I, *supra* note 14, at 411.

107 CAL. PENAL CODE § 667(a)(1) (West Supp. 1996).

108 CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996).

109 CAL. PENAL CODE § 667(a)(4) (West Supp. 1996).

110 CAL. PENAL CODE § 667(f)(1) (West Supp. 1996).

111 CAL. PENAL CODE § 667(f)(2) (West Supp. 1996).

role of the judge to cases where there is "insufficient evidence to prove the prior felony conviction" for its application to three strikes.[112]

C. "ANOTHER FOUL BALL": THE VARIETY OF THREE STRIKES LEGISLATION

In addition to California and Washington, the federal government and twenty one other states passed their own versions of three strikes, often times in political environments as heated as California's or feeling the heat and publicity generated by Polly Klass' murder and California's voter initiative and political activity surrounding three strikes. What resulted in these states, though, can be described as a variety of three strikes laws. In 1994 and 1995, 12 and 9 states respectively (including California) adopted three strikes. The federal government also adopted its own law in 1994. Alaska adopted its three strikes law in 1996.[113] In surveying these laws, one is struck by what is counted as a strike, what the strike zone is, and what happened when one struck out.[114]

For example, Georgia adopted a two strikes law that provided for life imprisonment for a second felony conviction.[115] Some other states, such as Arkansas, Montana, South Carolina, and Tennessee had two and three strike provisions that provided for enhanced penalties for second felony convictions.[116] Thirteen other states, including California, Colorado, and Connecticut had three strikes laws that provided for extended sentences up to life imprisonment with no parole for a third felony conviction Two states, Florida and Maryland, adopted a four strikes law with enhanced penalty provisions.[117] Hence, the variety of strikes allowed before penalty enhancement applied varied considerably.

What counted as a strike also varied. Some states only counted serious offenses that were violent, with violence subject to definition.[118] Other states included all felony convictions, while others included some assortment or combination of felony convictions as a strike. The type of enhancements also varied considerably, ranging from additional years in prison, a higher mandatory minimum sentence, life in prison with a possibility for parole, to life without parole.[119] Finally, the various laws

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112 *Id.*

113 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, "THREE STRIKES": FIVE YEARS LATER 6 (1999)[hereafter "CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1999"].

114 *Id.* at 6-9; *see also* Vitiello I, *supra* note 14, at 400-403. Vitiello provides a detailed analysis of the various details and applications of three strikes law. *Id.* at 463-481. *See also* Clark, *supra* note 94, at 6-13.

115 Clark, *supra* note 94, at 6-13.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

mandated or limited judicial and prosecutorial discretion to apply the three strikes, offering the ability to commit certain offenses or require application of the three strikes law.[120]

D. "FULL COUNT": SUMMARY

Three strikes legislation in its various permutations was described as a major innovation in law enforcement to reduce crime. Fueled by public fears of crime and political exploitation of that fear, three strikes legislation was supposed to cut down on violent crime, reduce social costs of crime, and incarcerate more hardened criminals for longer periods of time. Three strikes laws were passed despite concerns about the costs of such laws as well as the efficacy of mandatory minimum laws in reducing crime.

III. THREE STRIKES STRIKES OUT

Adoption of three strikes in over twenty-two states and by the federal government from 1993 to 1995 was meant to be a major effort towards reducing crime by locking up violent and habitual offenders who were supposedly responsible for most of the crime that was occurring. As a result, the supporters of three strikes assumed significant decreases in crime and social savings. The critics argued that three strikes laws would have little impact on crime, would increase prison costs and decrease capacity, and would produce large elderly prison populations. What has been the impact of three strikes so far? Clearly it has neither been all that supports promised or all that critics feared. Its impact has been mixed, and, overall, it is difficult to describe three strikes as a success.

A. CRIME REDUCTION

Supporters of three strikes laws claimed that these laws were a necessary crime control tool that would decrease violent crime by incarcerating more habitual offenders for longer periods of time. Since implementation of three strikes laws, crime rates nationally and regionally have decreased steadily.[121] Yet there is little evidence that three strikes laws have had any appreciable effect on this crime reduction.

Perhaps the simplest way to measure the efficacy of three strikes is first to look at the employment of the law in different states. Three strikes has hardly been employed very much since adopted. In Washington, there have only been 121 convictions under the law through August

120 *Id.*

121 *See* Fox Butterfield, *Prison Population Growing Although Crime Rate Drops*, N.Y.TIMES, Aug. 9, 1998, at A14.

21, 1998, Florida had 116 as of June, 1998, and the United States has had only 35 convictions through August, 1998.[122] As of August, 1998, in Colorado, New Mexico, North Carolina, Pennsylvania, and Tennessee five or less individuals had been sentenced in each state under their three strikes laws.[123] Three individuals had been sentenced in Wisconsin, six in New Jersey, and none in Utah under three strikes.[124] In the vast majority of the twenty two states and the federal government that have adopted three strikes, the law's effect on crime is arguably minimal since it is rarely used. The one exception is California where 4,468 offenders have been sentenced under the third strike provision and over 36,043 for a second strike offense.[125] This led California Governor Pete Wilson and the Secretary of State to credit the law with significant impact on the state's 6.5% drop in crime in 1994 and a 7% drop in 1995.[126]

There are several reasons to question the efficacy of these claims. First, the crime rates in California were already decreasing even prior to the adoption of the three strikes law and, thus, what may be occurring in the state is simply a regression of high crime rates back towards a more historic mean.[127] In addition, there is no evidence that the three strikes law precipitated any sudden or unique drop in the crime rate that might not be associated with an intervening variable, thus, again questioning the impact of the law. Third, studies supporting the efficacy of the law have been "unidimensional" and have failed to account for other variables that might influence crime rates, e.g., changes in the economy, population, and the impact of other laws or trends influencing crime.[128] In fact, at least one study concluded that the three strikes laws did not have much, if any, impact on the expected level of crime given the preexisting trends in the state.[129]

Fourth, if the aim of three strikes was to target violent felons, the law has generally been unsuccessful because the "application of 'three

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122 CAMPAIGN FOR EFFECTIVE CRIME POLICY1999, *supra* note 113, at 9.

123 *Id.*

124 *Id.; see also 'Three-Strikes' Laws Proving More Show than Go,* TRIAL, Jan. 1997, at 1;. *see also* Fox Butterfield, *'Three Strikes' Rarely Invoked in Courtrooms*, N.Y.TIMES, Sept. 10, 1996, at A1 (providing earlier analysis of the implementation of three strikes laws).

125 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1999, *supra* note 113, at 6.

126 *Id.*

127 EDWARD R. TUFTE, DATA ANALYSIS FOR POLITICS AND POLICY 56 (1974) (noting how examination of statistics or samples with unusual "highs' or "lows" eventually will regress or increase to approximate historic means or averages over time). Factors such as changes in the economy, unemployment, drug usage, or gang activity could have led to the decline in criminal activity or crime could have simply been unusually high during the early 1990s for random reasons and then simply fell to more historical norms.

128 *Id.*

129 Lisa Stolzenberg & Steward J. D'Alessio, *Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates,* 93 CRIME & DELINQUENCY 457 (1997).

strikes' has occurred in far more cases involving marijuana users than in cases involving violent felons."[130] Evidence suggests that nonviolent offenders and drug offenses predominate as the major triggers implicating three strikes. For example, one study indicating that 85% of those convicted under the law were convicted for nonviolent and drug offenses.[131] In fact, during the first eight months of California's three strikes law, 70% of those sentenced under it were for nonviolent and drug related offenses, and 41% of those subject to three strikes were there because of a property offense as opposed to 17% of those who committed a second strike felony offense.[132] Overall, while the law was meant to target violent felonies, it has failed to do so for the most part, again calling into question its efficacy in reducing California's violent crime rate.

Perhaps the law has had an impact on deterrence. The 1994 RAND study on the California three strikes law claimed savings as a result of the 340,000 crimes deterred.[133] However, one study indicated that 83% of the robbers caught and facing potential sentencing under three strikes did not expect to be caught,[134] and 80% of another sample of felons stated that they had no idea that they were subject to three strikes.[135] There is little evidence that the law deters because either criminals do not know of the law, or they simply believe they will not be caught. Overall, these studies confirm what many criminologists already knew, including what Zimring and Hawkins found in their study—many crimes are not calculated on the basis of the severity of punishment and that perhaps the certainty and not the severity of being caught is a far more important.[136] Finally, if three strikes has had an impact on deterrence, the data does not show it, and, as noted above, any change in California's crime rate can be attributed to factors exogenous to the adoption of three strikes.

Overall, there is no clear evidence that three strikes has secured its single most important criminological objective of reducing violent crime.[137]

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130 Vitiello II, *supra* note 95, at 1703.

131 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, THE IMPACT OF "THREE STRIKES AND YOU'RE OUT" LAWS: WHAT HAVE WE LEARNED? 6 (1996) [hereinafter "CAMPAIGN FOR EFFECTIVE CRIME POLICY 1996"); TRIAL, *supra* note 124, at 12; Vitiello II, *supra* note 95, at 1703. *See also* CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 199, *supra* note 113, at 13.

132 Vitiello II, *supra* note 95, at n. 244.

133 CAMPAIGN FOR EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 2.

134 *Id.* at 2.

135 *Id.*

136 The classic debate on whether certainty or severity of punishment is critical to deterrence can be traced to C.B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1778) versus JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948).

137 Vitiello I, *supra* note 95, at 433.

B. LEGAL IMPACT

A second way to examine the impact of three strikes is to determine its legal impact. There are three dimensions to this claim.

1. *Uneven Application of Three Strikes*

First, three strikes appears to have achieved certain unanticipated effects. Three strikes seems to have been applied differently in various areas, for example, prosecutors in California's more populous counties more likely to strike some offenses than others.[138] Studies also indicate that local political pressures seem to determine the use of three strikes.[139] In addition, the lack of flexibility has discouraged prosecutors from using these laws, and they prefer to employ other preexisting habitual offender laws already on the books.[140]

Second, there is some evidence that three strikes has influenced plea bargain and trial costs and behavior. For example, in Los Angeles, 4% of all felonies generally go to trial, yet 25% of the three strikes are going to trial.[141] Even though 45% of all three strikes are still plea bargained, the significant increase in demands for trials under the California law suggests that defendants charged under the law seek a trial in hope for acquittal instead of opting for the certainty of enhanced sentences under the second or third strike. Further, in time, as more defendants face enhanced penalties under the law, they may be less likely to plea to even a first strike, let alone subsequent strikes, to escape the law. The result, as already demonstrated in California, is more trials, more public costs for prosecutors, and more costs associated with public defenders who represent most of those coming to bat for three strike felonies.

Third, because three strikes is leading to more criminal trials, there is some evidence that civil trials are being delayed to accommodate the speedy trial provisions required for criminal trials.[142]

C. CONSTITUTIONAL CHALLENGES

1. *Federal Law*

A second dimension in which three strikes has had an impact on the law and legal process is in terms of challenges to its constitutionality. For example, general constitutional challenges have been raised against

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138 CAMPAIGN FOR EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 4.

139 *Id.*

140 *'Three-Strikes' Laws Proving More Show than Go*, TRIAL, Jan. . 1997, at 12. *See also* Fox Butterfield, *'Three Strikes' Rarely Invoked in Courtrooms*, N.Y.TIMES, Sept.10, 1996, at A1.

141 Jeffrey L. Rabin, *'3 Strikes' Proving Tough on Legal System, Study Says*, L.A. TIMES, Nov. 16, 1996, at A1.

142 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 6.

the federal law in several cases, but courts have rejected many of these claims.[143]

Perhaps the most serious challenge to the federal three strikes occurred in *United States v. Kaluna.*[144] In *Kaluna*, the issue was whether the statutory burdenshifting procedure used to determine a third strike was constitutional. The court rejected the general challenge to the three strikes law, but held that the burden-shifting provision of the law did violated the Due Process Clause of the Federal constitution. In contrast, in *United States v. Wicks*[145] the Seventh Circuit upheld the constitutionality of 18 U.S.C. §3559(c). This section of the federal three strikes law requires a defendant to prove by clear and convincing evidence that neither a dangerous weapon nor death or bodily injury had occurred in certain previous offenses so that in sentencing a prior strike would not be considered as a previous violent felony. In *Wickes* the court upheld the burden-shifting procedure, reasoning that the shift of a burden was permissible because the defendant's sentence was an exception to the general sentencing policy, and, in general, it was allowable for the defendant to bear the burden to exceptions to sentencing policy so long as the prosecutor proved all of the elements to the crime.[146]

Kaluna reached a decision contrary to the *Wicks.* Instead of viewing the defendant's burden as requiring him to demonstrate that his sentence was an exception to general sentencing policy, the *Kaluna* court held that the issue of whether a dangerous weapon was used was an essential element of the crime that the prosecutor had to prove to establish that an offense qualified as a serious felony.[147] Because it was an element of the crime, the government must carry the burden of proving it,[148] and shifting the burden to rebut to the defendant was unconstitutional.[149]

So far *Kaluna* is the only decision that successfully attacked the constitutionality of the federal three strikes laws, and it was withdrawn by the Ninth Circuit in 1998 pending an en banc ruling.[150]

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143 *See, e.g.,* United States v. Rasco, 123 F.3d 222 (5th Cir. 1997) (holding that federal three strikes law does not violate either the separation of powers or ex post facto principles of the Constitution); and United States v. Farmer, 73 F.3rd 836 (8th Cir. 1996) (federal three strikes law does not violate either the Double Jeopardy Clause of the Fifth Amendment or the Ex Post Facto Clause of the Constitution).

144 United States v. Kaluna, 152 F.3d 1069 (9th Cir. 1998).

145 United States v. Wicks, 132 F.3d 383 (7th Cir. 1997).

146 *Id.* at 389.

147 *Kaluna,* 152 F.3d at 1069

148 *See, e.g.,* Almendarez-Torres v. United States, 118 S.Ct. 1219, 1228 (1998).

149 *Kaluna,* 152 F.3d at 1073 .

150 United States v. Kaluna, 161 F.3d 628 (9th Cir. 1998).

2. *State Law*

There have been several challenges to state three strikes laws, but again, challenges to the California law have been the most persistent and prevalent.

Generally, challenges to the state laws have been upheld under the relaxed proportionality standards the Court laid down in *Harmelin v. Michigan.*[151] However, so far these challenges have mainly been made under the federal constitution, with state constitutional challenges yet to come. In addition, given the racial impact of three strikes,[152] equal protection challenges are sure to be raised even though disparate impact claims are hard to sustain in federal court.

Constitutional separation of powers issues led to the invalidation of part of the California three strikes in *San Diego County v. Romero.*[153] At issue in this case was whether the provision of the three strikes law that gave prosecutors the power to strike prior offenses but which denied the power to judges to dismiss prior felonies in the interest of justice violated the state constitutional separation of powers provisions. In ruling that trial judges might dismiss prior felony convictions absent prosecutorial motions, the California Supreme Court stated that "dismissal" is a judicial rather than a executive function,[154] and that this power cannot be conditioned upon approval of a district attorney.[155] The proposals to overturn the California Supreme Court decision were not successful. The impact of *Romero* is hard to estimate, yet it is possible that judges may strike many prior offenses to avoid what they perceive to be disproportionate or unfair sentences.[156] The result in *Pomero* might lessen the impact of three strikes law on sentencing, as well as, perhaps, a further change in plea bargaining and trial requests although data on either is lacking.

Besides *Romero*, the United States Supreme Court has twice denied challenges to various applications of the California three strikes law. In *Monge v. California*[157] the Supreme Court rejected a claim that the Double Jeopardy Clause applied to sentencing decisions in noncapital

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151 *See, e.g.*, State v. Hudson, 698 So. 2d 831 (Fla. 1997) (upholding the imposition of the mandatory minimum terms under the state habitual offender statute to be permissive and not mandatory). *But cf.* State v. Lindsey, 554 N.W. 2d 215 (Wis. Ct. App. 1996) (sentencing under the state three strikes laws is required and not permissive).

152 *See infra* Part III.F.

153 People v. Romero, 917 P.2d 628 (Cal. 1996).

154 *Id.* at 446-47.

155 *Id.*

156 *See also* California v. Garcia, 976 P.2d 831, 835 (Cal. 1999) (holding that state judges have the authority and limited discretion to strike prior convictions so long as the reasons for the striking were not to accommodate judicial convenience, to express antipathy to the three strikes law, or because the defendant pled guilty).

157 People v. Monge, 941 P.2d 1121, 1126 (Cal. 1998).

cases. In reaching that opinion, the Supreme Court distinguished non-capital from capital cases since in *Bullington v. Missouri*[158] the Supreme Court had previously ruled that a capital defendant who had received a life sentence could not subsequently receive the death penalty upon re-trial following an appeal. Noting that *Bullington* was an exception, the Supreme Court in *Monge* stated that, in general, sentencing decisions did not implicate the Double Jeopardy provision, and, therefore, the California law could consider past crimes and sentences when determining a sentence for a third strike.

In addition, in *Riggs v. California*[159] the Supreme Court denied certiorari in a case that asked whether the sentence violated the proportionality rule found in *Harmelin*. In *Riggs*, a defendant who stole a bottle of vitamins from a store was sentenced to 25 years to life because he had one prior offense. Had he not had this prior offense, the theft of the vitamins would have been classified as a misdemeanor with a fine or sentence up to six months. The existence of the prior crime required the trial court to treat this theft as a felony and, thus, impose the minimum 25 years to life. The Supreme Court denied certiorari in part because of lack of clarity on what role Riggs' criminal record played into his sentencing. Hence, Riggs had to await state court disposition on this issue.

Other states have had litigation similar to that of California's. In Wisconsin, a life sentence for a third strike that was a second degree sexual assault was held not be disproportionate under the state's cruel and unusual punishment clause.[160] Similarly, in that case the court rejected claims that the three strikes statute violated the state constitutional separation of powers doctrine.[161] In Georgia, ex post facto claims have been rejected.[162] In Louisiana, separation of powers,[163] ex post facto,[164] and double jeopardy[165] challenges to the state's three strikes laws have been rejected. Paralleling the *Wicks* opinion, in *State v. Denomes*[166] a Louisiana court held that placing the burden on the defendant to demonstrate that a prior conviction should not count as a strike is not a constitutional violation. In New Jersey, ex post facto claims have been rejected,[167] and in Washington it was held that due process did not re-

158 Bullington v. Missouri, 451 U.S. 430, 444-46 (1981).

159 Riggs v.California, 119 S. Ct. 890, 890 (1999)(denying certiorari because neither the California Supreme Court nor any federal tribunal addressed this question).

160 State v. Lindsey, 554 N.W.2d 215, 215 (Wis. Ct. App. 1996).

161 *Id.*

162 Johnson v. State, 493 S.E.2d 926, 927 (Ga. Ct. App.1997).

163 State v. Toliver, 635 So.2d 1190, 1192 (La. Ct. App. 1994).

164 State v. Keys, 694 So.2d 1107, 1114-15 (La. . Ct. App. 1997).

165 State v. Kennerson, 702 So.2d 867, 871 (La. . Ct. App. 1997); State v. Richardson, 637 So.2d 709, 715 (La. Ct. App. 1994).

166 State v. Denomes, 674 So.2d 465, 468-69 (La. Ct. App. 1996).

167 State v. Oliver, 689 A.2d 876, 879-80 (N.J.Super. Ct. App. Div. 1996).

quire a defendant to be separately charged with having violated the three strikes laws.[168]

Overall, states three strikes adjudication consistently rejects any constitutional claims of defendants.

D. DEFINING WHAT COUNTS AS A STRIKE

Another issue in state litigation is what counts as a strike for the purposes of three strikes laws.

First, the records are mixed regarding whether juvenile records count as a strike. For example, in some states juvenile ofenses may not be considered as a strike while in others that is not the case.[169] In California, a court held in *People v. Daniels*[170] that juvenile records of serious or violent crimes may count as a strike. This decision is troubling because in California juveniles are not always entitled to jury trials or bail and, thus, some individuals may be sentenced based upon prior offenses that did not offer them the same due process they would have been afforded were they adults.

In addition, in *People v. Hazelton*[171] the California Supreme Court ruled that out-of-state felony convictions may be counted as a strike because the voters did not intend to limit strikes to instate offenses, even though the ballot proposition that instituted three strikes was not clear on this issue.[172]

Overall, what counts as a strike is not clear and may conflict with some basic principles of due process, and may be not what voters had in mind when the law was adopted.

E. PRISON CAPACITY AND COSTS

Critics of three strikes claimed that these laws would lead to an explosion in prison costs and to prison overcrowding. The infrequent use of three strikes laws by twenty two states and in the federal government means that the few people who were sentenced under these laws have not increased costs or contributed in prison overcrowding in any meaningful way. In California, a 1994 study predicted that three strikes would be the single most important variable affecting prison costs in terms of capacity, health care costs for geriatric prisoners, and prison construction.[173] While over 40,000 defendants have been sentenced under the second or

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168 State v. Thorne, 129 Wash. 2d 736, 779-81 (1996).

169 Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment*, 81 JUDICATURE 206, 210 (1998).

170 People v. Daniels, 51 Cal. App. 4th 520, 525-26 (Cal. Ct. App. 1996).

171 People v. Hazelton, 929 P.2d 423, 425-27 (Cal. 1996).

172 *Id.* at 427.

173 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 8.

third strike provisions of the three strikes law, the real costs of their containment have not shown up yet, and it may take ten or more years before that occurs. The reason is that 13,000 defendants sentenced under two strikes will not begin to serve their extra second strike time for a few years. Also, those sentenced under the third strike provision will not have their costs born out until the space that would be used for them comes at the expense of other defendants, or when their geriatric health care costs must be born by the state. At present, the evidence suggests that due to the lack of the use of the law in all but one jurisdiction there is no significant prison or incarceration costs, and in the case of California, the costs have yet to be materialized.

In addition, it is predicted that previous sentencing reforms, a tightening of parole, and truth-in-sentencing laws will have a greater impact on prison capacity and future prison population than three strikes wil.[174] Hence, in determining of future costs associated with prison maintenence and occupancy, many other factors besides the three strikes need to be examined and considered as possibly more determinative.

One area where incarceration costs have increased is the cost of pretrial detention. Because many three strikers are either unable or ineligible to make bail and more of them demand trials, local jails have become more crowded. Consequently, the costs associated with housing more individuals awaiting trials and providing more security personnel to guard these individuals have increased.[175] For example, in California there is an 11% increase in pretrial detention in local jails as a result of three strikes.[176] The cost of increased pretrial detention which was neither anticipated nor estimated when the three strikes laws were evaluated is one more expense that must be considered in evaluating the cost of three strikes.

Another way to calculate the prison costs associated with three strikes laws is to compare the costs of incarceration to that of nonincarceration [traditional] punishments. For example, a RAND drug policy study of mandatory minimums for drug offenses found that incarceration sentences were more expensive than both traditional sentences and drug treatment programs.[177] Given that many defendants sentenced under three strikes were sentenced for drug offenses, evidence suggests that

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174 James Austin, *The Effect of "Three Strikes and You're Out" on Corrections, in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 155, 170-71 (David Shichor & Dale K. Sechrest eds., 1997).

175 Kelly McMurry, *Three-Strikes Laws Having More Show than Go*, TRIAL, Jan.1997, at 13.

176 Dale Parent, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION 1, 3 (Jan. 1997).

177 RAND, ARE MANDATORY MINIMUM DRUG SENTENCES COST-EFFECTIVE?, RAND DRUG POLICY RESEARCH CENTER RESEARCH BRIEF RB-6003 (1997).

three strikes is not a cost- effective means to address drug and drug related crimes.

Overall, it is unclear whether three strikes provide any social savings. Instead it appears that three strikes laws are more expensive than traditional sentencing schemes.

F. RACIAL IMPACT

Prior to the adoption of three strikes law there were no studies on the racial impact of these laws upon sentencing or prison populations. In the jurisdictions that have adopted three strikes, the infrequent use of these laws has made any meaningful racial analysis difficult. However, California's use of three strikes demonstrates that racial minorities are more likely to feel the impact of three strikes than non-minorities. While African-Americans constitute only 7% of the California's total population and 20% of individuals arrested for felony crimes, they constitute 43% of those sentenced under the three strikes law.[178] Caucasians, on the other hand, comprise 53% of the state population and 33% of the individuals arrested for felonies, but they constitute less than 25% of all those sentenced under three strikes.[179] Overall, one study concluded that in California "African-Americans are being sent to prison . . .more than thirteen times as often as whites" under the three strikes law.[180]

Still is difficult to argue that three strikes laws are the cause of this disparate impact upon African-Americans. The war on drugs, which includes enhanced penalties for possessing and selling crack, has already increased the likelihood that African-Americans and other racial minorities will face felony prosecution and convictions both in greater percentages and numbers than caucasians.[181]Similarly, policing practices that target racial minorities also increase the likelihood that members of minority groups will be affected by three strikes more than whites, potentially subjecting them to more arrests, prosecutions, and convictions that can be counted as strikes.[182] These laws just enhance an already dispa-

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178 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 7.

179 *Id.*

180 *Id.*

181 *See* David Schultz, *Rethinking Drug Criminalization Policies* 25 TEX. TECH L. REV. 151, 157-66 (1993) (discussing of the racial impact and social costs associated with the war on drugs).

182 *See, e.g.*, Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J. L. & POL'Y. 291, 293-94 (1997) (noting the practice of Blacks being stopped by the police solely on account of race). *See also* Iver Peterson, *Whitman Concedes Troopers Use Race in Stopping Drivers*, N.Y. TIMES, Apr. 21, 1999, at A1 (reporting that New Jersey Governor Christine Todd Whitman and the Attorney General Peter G. Verniero acknowledged that state troopers has singled out black and Hispanic motorists to stop along the highway and that "77% or more of those asked to consent to a search of their vehicle during a stop are minorities.").

rate racial impact on sentencing and prison population. Hence, three strikes will simply compound existing racial disparity, putting more members of minority groups to prisons for longer periods of time.

Unfortunately, efforts to challenge three strikes federal on equal protection grounds will probably fail. The Supreme Court has already rejected equal protection claims based on disparate impact on death penalty sentencing[183] and in the use of prosecutorial discretion to charge individuals.[184] In both cases, the Supreme Court has demanded a particularized showing of discrimination, not simply a statistical demonstration of impact. Whatever primary or contributory impact three strikes has on the racial composition of prisons or the application of the law, it is unlikely that the federal courts will intervene.

G. SOCIAL SAVINGS

Three strikes laws were supposed to produce significant social savings by decreasing crime. For the federal government and the twenty-one states (excluding California) that passed three strikes, any savings are either insignificant or impossible to estimate. California estimates, as noted earlier, were that there would be a total savings of $23 billion dollars by the year 2000 resulting from decreased security costs and expenses by crime victims.

It is impossible to conclude that three strikes has led to any savings in California either. First, since one cannot definitely attribute any drop in the state's crime rate to the law itself, it is impossible to link any decrease in victims' expenses or savings on security or insurance, if any, to the law. Second, there is no indications that insurance rates, security expenses, or money spent to help victims of crimes have decreased. Third, any social savings that might have resulted from three strikes might well be offset by additional expenses in implementing these laws. These implementational expenses, as noted earlier, result from additional trials, legal fees, and incarceration costs. In addition, depending on how one defines social costs, implementing a law that exacerbates racial disparities in the criminal justice system adds to the distrust that some have toward the law and society. Such distrust, while difficult to quantify in a pecuniary sense, adds to racism whether it be the reality or perception in our society.

Finally, one more cost associated with the implementation of three strikes may be an increase in violence against police by offenders seeking to avoid arrest under three strikes. Some claim that repeat offenders have an additional incentive to elude capture by police in order to avoid

183 McCleskey v. Kemp, 481 U.S. 279, 280 (1987).

184 United States v. Armstrong, 517 U.S. 456, 456 (1996).

the enhanced penalty provisions of the law. Studies from Fresno, California, and Seattle, Washington, suggest that increased violence against police by offenders was motivated by three strikes.[185] However, while three strikes may account for part of this increased violence against arresting officers, these studies are not conclusive. First, these studies comprise only two cities that have adopted three strikes. In many cases, such as Los Angeles, where three strikes is used more than anywhere else, there is no evidence of increased violence against police during arrest. Second, even if violence has increased, there is little evidence linking violence to three strikes. Third, given other studies that have suggested that many offenders did not think three strikes would apply to them, it is arguable that many facing arrest are unaware of the applicability of the law to them and, hence, elude capture for reasons other than three strikes. Thus, the evidence is inconclusive on whether the adoption of three strikes laws has led to increased violence against police.

CONCLUSION: "MIGHTY CASEY HAS STRUCK OUT."

As a crime control policy, there is little evidence that three strikes has reduced violent crime or produced the social savings that its backers claimed. At the same time, so far the law has not resulted in overcrowded prisons full of aging criminals, so many of the concerns of its critics have failed to materialize at this time. However, not anticipated by either the proponents or critics of three strikes, are the effects three strikes has had on civil trials, plea bargaining, jail capacity, and the racial composition of prisons. Overall, implementation of three strikes has proved to be less and more than what most people expected, yielding mixed results.

In terms of public policy, one can argue that three strikes was doomed to fail. Zimring and Hawkins' work on mandatory sentences, as well as states' studies on the same topic, should have provided good evidence of the likely impact of three strikes and the types of sentences might reduce the number of violent crimes. Unfortunately, what is often good social science research is not always good campaign rhetoric. Three strikes is an example of policy devoid of a good evidentiary basis for its enactment, rendering the law valuable mostly in terms of its symbolism and ability to mobilize crime-fearful voters at the polls.[186]

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185 CAMPAIGN FOR AN EFFECTIVE CRIME POLICY 1996, *supra* note 131, at 3.

186 CHARLES E. LINDBLOM & DAVID K. COHEN, USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING 10-11 (1979) (describing the use of professional social inquiry and analysis as "one route" to social problem solving or policy making).